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No. 91-1319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRED L. LANGFORD

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

1. Is a criminal defendant impermissibly prejudiced by being convicted on multiplicitous counts of an indictment in ways other than being sentenced to consecutive sentences for the multiplicitious counts.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

The Petitioner, Fred L. Langford, (hereinafter "Mr. Langford"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on November 5, 1991

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 946 F.2d 798 (11th Cir. 1991) and reproduced in the Appendix hereto (App. A, at A-1).

JURISDICTION

Mr. Langford's petition seeks review of the Judgment of the Court of Appeals entered on November 5, 1991. (App. A, A-1). This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition presents to this Court an important question of Federal Law which has not been, but should be settled by this Court. Rules of the Supreme Court, Rule 10.1(c).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

1. Rules of the Supreme Court, Rule 10.1(c):

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

2. The Fifth Amendment to the United States Constitution:

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same to be twice put in jeopardy of life or limb; nor shall be compelled to in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. **15 U.S.C. § 78j (b)**

Manipulative and deceptive devices —

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public

interest or for the protection of investors.

4. **15 U.S.C. § 78ff. Penalties**

Willful violations; false and misleading statements

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Failure to file information, documents, or reports

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(c)(1) Any issuer which violates section 78ddl(a) of this title shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-l(a)

of this title shall, upon conviction, be fined not more than $10,000 or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated section 78dd-l(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

5. **28 C.F.R. § 2.18 Granting of Parole.**

The granting of parole to an eligible prisoner rests in the discretion of the U.S. Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).

6. **28 C.F.R. § 2.20 Chapter Thirteen General Notes and Definition Subchapter A - General Notes.**

2. If an offense behavior involved multiple separate offenses, the severity level may be increased. Exception: in cases graded as Category Seven, multiple separate offenses are to be taken into account by consideration of a decision above the guidelines rather than by increasing the severity level.

7. **Federal Sentencing Guidelines § 4A1.1 Criminal History Category.**

The total points from items (a) through (f) determine the crimi-

nal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

STATEMENT OF THE CASE

A. Nature of the Case.

Mr. Langford appealed his criminal conviction in the United States District Court for the Middle District of Florida, Tampa Division to the Eleventh Circuit Court of Appeals. One issue presented in that appeal was that Counts two, three, and four of the criminal indictment upon which Mr. Langford was convicted were multiplicitous, and for that reason Mr. Langford's convictions on those Counts should be overturned and Mr. Langford granted a new trial. The court of appeals agreed that Counts two, three and four were multiplicitous, but refused to grant a new trial merely because the sentences imposed on those counts run concurrently, not consecutively. No other forms of prejudice to Mr. Langford stemming from this recognized error were considered by the appellate court.

Counts two, three and four alleged violations of Federal Law in that those Counts charged that Mr. Langford committed securities fraud relating to false statements made in a proxy statement, a telephone call, and a letter, in violation of 15 U.S.C. §§ 78j(b) and 78ff (1988). The jurisdiction of the Eleventh Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 1291, providing that the United States Court of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

B. The facts of the case.

On July 13, 1988, a grand jury sitting in the Middle District of Florida returned an indictment charging Fred L. Langford and William J. Bufe with the following offenses: Count One - conspiracy

to commit stock fraud; to make false entries on the books and records of Palmetto Federal Savings and Loan and Goldome Savings Bank, institutions insured by the Federal Savings and Loan Insurance Corporation; to make false statements to the Federal Home Loan Bank Board, an agency of the United States; and to misapply the funds of Palmetto Federal, in violation of Title 18, United States Code, Section 371;

Counts Two, Three and Four - stock fraud, in violation of Title 15, United States Code, Section 78j(b) and 78ff and Title 18, United States Code, Section 2;

Counts Five and Six - false entries in the books and records of Palmetto Federal Savings and Loan and Goldome Savings Bank, in violation of Title 18, United States Code, Sections 1006 and 2;

Count Seven - false statements to the Federal Home Loan Bank Board, an agency of the United States, in violation Title 18, United States Code, Sections 1001 and 2; and

Counts Eight, Nine and Ten - willful misapplication of the funds of Palmetto Federal, in violation of Title 18, United States Code, Sections 657 and 2 (R 1-1).*

The criminal activity alleged to have been committed arose from Mr. Langford's activities during his employment by Palmetto Federal Savings and Loan Association. Palmetto Federal Savings and Loan Association was established in 1956 as a mutual savings and loan association (R 20171, 172). Mr. Langford was the managing officer of Palmetto when it opened (R 20-171). He ultimately became president and chief executive officer of Palmetto and remained with the institution until his resignation which was effective on March 15, 1984 (R20-171).

Mr. Langford was arraigned on July 20, 1988, and pleaded not guilty (R 1-8). Both defendants filed various pretrial motions. Defendant Bufe filed a motion to dismiss Counts two, three and four

*References are to the record on appeal

or, in the alternative, to compel election, which was subsequently adopted by Mr. Langford (R 1-72; 19-52, 53, 63).

Jury trial in this case began on June 5, 1989, before the Honorable Ben Krentzman. After the Government rested its cases, Mr. Langford moved for a judgement of acquittal as to all counts (R 16-48 through 94). The District Court granted the motions as to Counts Eight, Nine and Ten and denied the motions as to the remaining counts (R 2-140; 16-94). Both Defendants testified and presented witnesses on their behalf.

All motions were renewed at the close of the case (R 25-158). The District Court reserved ruling on the motions until the jury verdict and ultimately denied Mr. Langford's motion for judgement of acquittal (R 25-160; 28-5).

On July 17, 1989, following approximately 22 days of trial, the jury found Mr. Langford guilty as to all counts and Mr. Bufe not guilty as to all counts (R 28-3). Mr. Langford was adjudicated guilty of all counts. (R 3-3; 28-5). On August 24, 1989, Langford was sentenced to concurrent three-year terms of imprisonment on each count and was ordered to pay $6,705.19 for costs of the prosecution and a $15,000.00 fine (R 2-146; 3016,17).

The alleged criminal activity occurred prior to November 1, 1987. For that reason the Federal Sentencing Guidelines, enacted by the Sentencing Reform Act of 1984, were not applicable to Mr. Langford's case because the effective date of that law was November 1987. Sentencing Reform Act, Pub. L. No. 98-473, Title II, §§ 211 (October 12, 1984). Consequently, Mr. Langford is eligible for parole subject to the determination of a parole release date by the United States Parole Commission.

A notice of appeal was filed on August 29, 1989, (R 2-148). On November 5, 1991, the Eleventh Circuit issued its judgment, reported at 946 F.2d 798 (11th Cir. 1991). This judgment affirmed the judgment of the District Court. *Id.* at 805

REASONS FOR GRANTING THE WRIT

I. The issue of whether a criminal defendant is impermissibly prejudiced by convictions on multiplicitous counts in ways other than being sentenced consecutively on the multiplicitous counts is an important question of Federal Law that should be settled by this Court.

On appeal, one of the issues raised by Mr. Langford was that his convictions on Counts two, three and four of the indictment were multiplicitous in that a single conspiracy to defraud under 15 U.S.C. §§ 78j(b) and 78ff could sustain only one conviction, despite the fact that instrumentalities of interstate communication or the mails were used on different occasions to further the scheme to defraud. For that reason Mr. Langford could only properly be convicted of one of those counts. An indictment is multiplicitous when it charges a single offense in more than one count. *United States v. Anderson*, 872 F.2d 1508, 1520 (11 th Cir. 1989).

On November 5, 1991, a three judge panel of the Eleventh Circuit entered its judgment on the appeal. In its opinion, the appellate court found that Counts two, three and four of the indictment were indeed multiplicitous. *United States v. Langford*, 946 F.2d 798, at 804. The appellate court also held that the *principal* danger from a multiplicitous indictment is that the defendant may receive multiple sentences for a single offense, *Id.* citing *United States v. Hearod*, 499 F.2d 1003, 1005 (5th Cir. 1974). The appellate court held that this danger did not exist in this case because the sentences for the multiplicitous counts run concurrently, not consecutively. *United States v. Langford*, 946 F.2d 798, at 805.

Though the appellate court found Counts two, three, and four to be multiplicitous, the appellate court also found this error to be harmless due to the fact that Mr. Langford's sentences for these counts ran concurrently, not consecutively. Thus, the appellate court affirmed the judgment of the district court, leaving intact the convictions on Counts two, three, and four, though the appellate court treated these counts as merged into one count. *Id.* at 805.

The holding of the appellate court focused solely on one type of prejudice that can attach due to convictions on multiplicitous counts, that being the danger of consecutive sentences. Consecutive sentences on multiplicitous counts are to be avoided because they would represent a form of double jeopardy prohibited by the Fifth Amendment to the United States Constitution.

However, there are other serious and improper forms of prejudice that have attached to Mr. Langford due to these multiple convictions that were never addressed by the appellate court. Because the opinion of the appellate court fails to take into consideration these other forms of prejudice, this Court should grant this Petition for Writ of Certiorari so that this Court can examine these forms of prejudice heretofore not considered by any other court, leaving this area of the law unsettled. Only by granting this Petition will the law of the land be settled as to this important question of Federal Law in regard to the modern dangers of multiple convictions for a single act. Rules of the Supreme Court, Rule 10.1(c).

The forms of prejudice that were not considered by the appellate court nonetheless represent increased punishment of the criminal defendant, as do consecutive sentences, due to multiplicitous convictions. Thus, these forms of prejudice that remain not considered are also forms of double jeopardy prohibited by the Fifth Amendment. American jurisprudence recognizes that criminal punishment entails not only the imposition of concurrent prison sentences, but also other forms of punishment such as fines, and the right to be released on parole.

The forms of prejudice and punishment not recognized by the appellate court are many. First, because this is a presentencing guidelines case, Mr. Langford is eligible for parole. In determining Mr. Langford's parole status, the number of crimes which he stands convicted of will affect his parole status and his parole release date. In determining Mr. Langford's parole release date the Parole Commission will consider these convictions to be separate offenses. Accordingly, Mr. Langford's parole release date will be postponed, effectively increasing his punishment by forcing him to serve a longer prison sentence.

Specifically, Mr. Langford's presumptive release date would be affected by his convictions on multiplicitous counts as follows. The methodology of determining a prisoner's parole release date is found at 28 C.F.R. §§ 2.1 et seq. 28 C.F.R. § 2.18 provides as follows:

> "The granting of parole to an eligible prisoner rests in the *discretion* of the U.S. Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined: and upon consideration of the *nature and circumstances* of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole). (emphasis added)."

Additionally, 28 C.F.R. § 2.19(a)(2) specifically states that "official reports of the prisoner's prior criminal record" shall be considered.

In determining the parole release date the Commission makes use of a guidelines chart, found at 28 C.F.R. § 2.20. That chart is a function of the "Offense characteristics: Severity of Offense Behavior" and the "Offender characteristics". In using this chart, offenses are divided into categories, based upon the severity of the offense. Naturally, the more severe the offense, the higher the category, and the parole release date is placed further in the future than if the offense had been less severe.

Additionally, 28 C.F.R.§ 2.20 Chapter Thirteen, Subchapter A, contains general notes on the application of the parole guidelines. 28 C.F.R. § 2.20 Chapter Thirteen, Subchapter A (2) states in pertinent part:

> "2. If an offense behavior involved multiple separate offenses, the severity level may be increased."

Accordingly, the Parole Commission would, under its guidelines,

extend the length of time that Mr. Langford will spend in prison based upon his multiple convictions.

The judgment in this case leaves intact, for the purposes of applying the parole regulations, Mr. Langford's conviction on three counts that the judgment in this case held were multiplicitous. Based upon the application of the above cited regulations, Mr. Langford will clearly be subject to a determination by the Parole Commission that his parole release date should be put off or postponed due to his convictions on these three multiplicitous counts. Based upon the Parole Commission's regulations these multiple convictions would represent "multiple separate offenses." Such a determination effectively would increase Mr. Langford's punishment by extending the time that Mr. Langford must spend in Federal Prison. This determination would be a direct result of Mr. Langford's improper conviction of three crimes instead of one crime. As such, a very real form of unfair prejudice to Mr. Langford has been demonstrated, yet this prejudice was not considered by the appellate court.

A second form of prejudice, not considered by the appellate court, has attached to Mr. Langford due to his conviction on these three multiplicitous counts. Mr. Langford was fined $15,000 for the counts upon which he was convicted, including the three multiplicitous counts.

Admittedly, the record of this case does not reveal the trial judge's thought process in arriving at the amount of this fine. Yet, a safe assumption would be that the trial judge examined the nature and number of counts upon which Mr. Langford stood before him convicted, and then either determined a fine for each count or determined an aggregate fine that the trial judge felt was suited to the nature and number of counts.

In either instance, the number of counts upon which Mr. Langford was convicted would enter into the decision making process. The higher the number of counts, the higher the fine. Because a fine imposed in a criminal case is a component of the punishment, Mr. Langford's punishment in this respect was undoubtedly increased due to his conviction on these three multiplicitous counts, thus

improperly prejudicing him.

Thirdly, in the situation of Mr. Langford again being charged and convicted of a federal crime in the future, his punishment for that crime would be increased due to his conviction on these multiplicitous counts. Any punishment for such a crime would be determined by the application of the Federal Sentencing Guidelines.

In determining a Federal Sentencing Guidelines sentence, the trial judge applies a table found at Chapter Five, Part A of the Federal Sentencing Guidelines. This table is a function of "Offense Levels" and "Criminal History Categories." The higher the Criminal History Category, the higher the sentence. In determining the Criminal History Category the Federal Sentencing Guidelines direct that consideration be given to each prior sentence of imprisonment exceeding one year and one month. *See,* Federal Sentencing Guidelines § 4A1.1(a). Additionally, the sentencing mechanisms in many, if not all, states similarly take into account the number of prior convictions.

Because in this case Mr. Langford was sentenced separately on each of the three multiplicitous counts, albeit concurrently, each sentence will be considered as adding to Mr. Langford's Criminal History Category point level. Thus any future sentence received by Mr. Langford would be increased due to his conviction on these three multiplicitous counts, improperly and unjustly prejudicing him.

Lastly, the appellate court's judgment disregarded a fourth form of prejudice that arises from multiplicitous counts in a criminal indictment. As the appellate court stated:

> "Langford contends that the multiplicitous counts of the indictment improperly prejudiced the jury by suggesting that the defendant committed not one but several crimes and, therefore, all three counts should be reversed. The principal danger in a multiplicitous indictment is, however, that the defendant may receive multiple sentences for a single offense." *Id.* at 804, citing *United States v. Reed,* 639 F.2d 896 at 904 (2d Cir. 1981) and *United States v. Hearod,* 499 F.2d 1003 at 1005 (5th Cir. 1974).

It is of course true that the danger of a defendant receiving multiple sentences for the same offense is a vice that potentially flows from a multiplicitous indictment. Yet this cited passage demonstrates that the appellate court in this case was of the belief that the danger of multiple sentences was the *only* recognizable prejudice stemming from convictions on multiplicitous counts. Both the cases cited by the appellate court, *Reed* and *Hearod,* directly stand for the proposition that prejudice caused by the suggestion to the jury that the defendant committed not one but several crimes, is grounds for reversing convictions on multiplicitous counts.

The danger of jury prejudice very real in this case as the prosecutor, in his closing argument, and the trial court in its instructions to the jury, both spoke of Counts two, three and four as being separate crimes committed by Mr. Langford (R 22-101, R 23-102, 114). Specifically, the prosecutor in this case emphasized the individual actions alleged in these counts.

> "The stock fraud counts, Counts Two, Three and Four relate to things that were done to further the scheme, to inflate the financial institution. In Count Two, it alleges that a proxy statement was made to all of the shareholders, and it was, and you have heard testimony about that. And that proxy statement was an indictment to encourage people to sell their stock to Goldome, get their proxies, and set out the financial information on the institution. And the proxy statement was mailed, obviously in furtherance of the scheme in order to encourage the sale of the stock.
>
> Count Three sets out a long distance telephone call in furtherance of the scheme to defraud. That is the telephone call between Mr. Langford and Mr. Strucker that Alabama — excuse me — at Atlantic Financial to arrange for the $500,000 loan to deceive the auditors into thinking that F.R.G. loans were being approved according to their suggestions. He knew he couldn't loan the money directly to F.R.G. himself, so he did another one of his sham transactions and got a third party, a third bank, to lend the money; and instead of buying it back, he just agreed to make it good, and ultimately the auditors were deceived. They didn't know that the guaranty had been made. The money came from an outside source, is what they thought,

and the loan-to-value went up.

> And with respect to Count Four, the Alabama buy-back letter of $774,000, the institution was told, Mr. Bufe was told, by Mr. Pacetti that they had to sell the loan, or the profit on Iona Point was going to be reversed; and they did sell the loan. And that was — Iona Point profit was in March, if I am not mistaken, of '83, The buy-back letter was sent in July of 1982. Excuse me. July of '83, a few weeks before the final merger, so that they wouldn't lose the profit on Iona Point. And the buy-back letter, or course, was at the urging and assistance, obviously, of Alabama Federal, just like Mr. Porter testified about the earlier one. (R22-101)

Additionally, the trial court in its instructions specifically instructed the jury that each count should be considered separately, thus emphasizing that three separate crimes were alleged to be committed (23-102). The judgment in this case totally *disregarded* the prejudicial impact on the jury stemming from the multiplicitous counts contained in the indictment in this case and focused solely on the danger of consecutive sentences.

CONCLUSION

The judgment entered in this case left intact Mr. Langford's convictions on multiplicitous counts, though the appellate court found Counts two, three and four to be impermissibly multiplicitous. The judgment totally disregards four forms of prejudice that may stem from such counts and held that only one form of prejudice, that of consecutive sentences on multiplicitous counts, was worthy of consideration. For this reason the appellate court found the error to be harmless. This Petition has demonstrated that there are four other forms of prejudice that can accrue to a criminal defendant when he is convicted on multiplicitous counts. Because this is an important issue of law that could affect the nature and extent of criminal punishment imposed upon Mr. Langford and other criminal defendants, this Court should settle the law as to this issue so as to prevent injustice in criminal sentencing and to ensure that no criminal defendant is impermissibly prejudiced by being convicted upon multiplicitous counts.

Accordingly, the Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari and to require briefs on the merits and oral argument of this cause.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES of America,

Plaintiff-Appellee,

v.

Fred L. LANGFORD,

Defendant-Appellant.

No. 89-3754.

United States Court of Appeals,
Eleventh Circuit.

Nov. 5, 1991.

John M. Fitzgibbons, Tampa, Fla., for defendant-appellant.

James Powers, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before POWELL*, Associate Justice, TJOFLAT, Chief Judge, and KRAVITCH, Circuit Judge.

TJOFLAT, Chief Judge:

The principal issue in this appeal, an issue of first impression in this circuit, is whether the use of multiple mailings or instrumentalities of interstate commerce in furtherance of a conspiracy to defraud a purchaser of securities can form the basis of multiple counts of an indictment under the provisions of 15

U.S.C. §§ 78j(b), 78ff, and Rule 10b-5.[1] We hold that it cannot.

I.

From 1981 to 1983, Fred L. Langford, the appellant, was president and chief executive officer of Palmetto Federal Savings and Loan Association (Palmetto Federal), a federal stock association.[2] During his tenure as president of Palmetto Federal, Langford devised and carried out a fraudulent scheme that inflated artificially the price of Palmetto Federal's stock.[3] His scheme worked in this way. The 600 Investment Corporation (600), a wholly owned subsidiary of Palmetto Federal,[4] entered into several joint venture agreements in Florida real estate on behalf of Palmetto Federal. 600 conducted sham sale transactions of its real estate interests with developers and other investors and then recorded the "profits" from these transactions on its books. The "profits" were added to Palmetto Federal's financial statements and, in turn, increased the value of Palmetto Federal's stock. Langford then arranged a sale of all of Palmetto Federal's stock to Goldome Savings Bank (Goldome) for $33.00 a share (a total of $38,000,000)—a price that significantly overrepresented its worth.[5]

In carrying out this scheme, Langford caused 600 to ignore two "generally accepted accounting principles" (GAAP):[6] Before 600 could record or "book" a profit from the sale of an interest

1. Stated more broadly, the issue embraces the sale as well as the purchase of securities. In this case, the alleged victim of the conspiracy to defraud was a purchaser.

2. Palmetto Federal was established in 1956 as a mutual savings and loan association but converted to a federal stock association in November 1979.

3. The evidence adduced at Langford's trial established beyond a reasonable doubt the facts recited in the text. Langford's challenge to the sufficiency of the evidence to convict is meritless, as indicated in note 13 *infra*.

4. Langford was on the board of directors of both Palmetto Federal and 600.

5. 600's sham transactions for the years 1982 and 1983 artificially inflated the total selling price of Palmetto Federal stock by approximately $10,000,000.

6. Langford concedes that both Palmetto Federal, as a federal stock association, and 600, as its wholly owned subsidiary, were bound to adhere to these principles.

in real estate on its financial statement, (1) it had to receive from the purchaser an adequate cash down payment[7] and, (2) it had to relinquish any continuing involvement in the assets sold. Langford, to avoid these requirements, arranged for 600 to make side payments to the developers and investors so that it would appear that the requisite cash down payment had been paid and that 600 had divested itself of a continuing interest in the assets sold; in reality, neither requirement was met.

On July 13, 1988, a federal grand jury returned the indictment in this case, charging Langford and William J. Bufe, Palmetto Federal's chief financial officer, with ten counts related to this scheme. Count one charged the defendants with conspiring to commit an offense against the United States, in violation of 18 U.S.C. § 371 (1988).[8] Counts two, three, and four charged the defendants with securities fraud relating to false statements made in a proxy statement, a telephone call, and a letter, in violation

7. In the transactions involved in this case, GAAP required either 20% or 25% cash down payments.

8. Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Count one alleged specifically that the defendants conspired to execute a scheme to defraud in connection with the sale of securities, 15 U.S.C. § 78j(b) (1988), to make false entries in the books of an insured institution, 18 U.S.C. § 1006 (1988), to make false statements to a government agency, *id.* § 1001, and to misapply funds of a federally insured institution, *id.* § 657. The remaining nine counts alleged that Langford and Bufe committed the substantive offenses outlined in the conspiracy count.

of 15 U.S.C. §§ 78j(b) and 78ff (1988).[9] Counts five and six alleged false entry offenses, in violation of 18 U.S.C. § 1006 (1988).[10] Count seven charged a false statement offense, in violation of 18 U.S.C. § 1001 (1988).[11] And counts eight, nine, and ten alleged the misapplication of the funds of an insured

9. Section 78j provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 78ff provides:

> (a) Any person who wilfully violates any provision of this chapter . . . , or any rule or regulation thereunder . . . , or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both . . . .

10. Section 1006 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with . . . [a] savings and loan corporation or association authorized or acting under the laws of the United States . . . [,] the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, . . . with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, [or] makes any false entry in any book, report or statement of or to any such institution, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Congress amended this section in 1989 to provide the significantly harsher penalties of fines of "not more than $1,000,000 or imprison[ment] not more than 30 years, or both."

11. Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

institution, in violation of 18 U.S.C. § 657 (1988).[12]

The case went before a jury on June 5, 1989. The Government's principal witness was Gordon Powers, executive vice president of 600. Powers testified that under Langford's orchestration, he executed several of the sham sales transactions 600 had engaged in; he located the real estate interests to be "sold," the "purchasers" of those real estate interests, and supplied side money to the "purchasers" for the required GAAP down payments.

After the Government rested its case, the court granted Langford's and Bufe's motions for judgments of acquittal on counts eight, nine, and ten of the indictment, and denied their motions on counts one through seven. The defendants then presented their cases. Langford's defense was, simply, that he played no role in the alleged scheme. Initially, he attempted to establish this point during the Government's case in chief—by cross-examining Powers. He was unsuccessful, however, so, after the Government rested its case, Langford took the witness stand. Langford testified that he had managed Palmetto Federal and 600 in a "hands off" manner; he delegated everything to his subordinates. Accordingly, although he knew about 600's real estate transactions, he knew none of the details. In short, he relied on the representations of his subordinates and the company's attorneys, who assured him that these transactions were being handled properly.

[1-4] The jury rejected Langford's defense and found him guilty on the seven remaining counts of the indictment. Bufe, on the other hand, was acquitted. Langford now appeals. He raises several issues, but only one—whether the securities fraud counts are multiplicitous—is worthy of discussion. We dispose

12. Section 657 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with . . . [a] savings and loan corporation or association authorized or acting under the laws of the United States . . . [,] the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, . . . embezzles, abstracts, purloins or willfully misapplies may moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

Congress amended this section in 1989 to provide significantly harsher penalties for amounts embezzled, abstracted, purloined or misapplied that exceed $100 to include fines of "not more than $1,000,000 or imprison[ment] not more than 30 years, or both."

of his other issues in the margin.[13]

II.

[5-7] Multiplicity is the charging of a single offense in more than one count. *United States v. Anderson,* 872 F.2d 1508, 1520 (11th Cir.1989) (quoting *Ward v. United States,* 694 F.2d 654 (11th Cir.1983)). When the government charges a defendant in multiplicitous counts, two vices may arise. First, the defendant may receive multiple sentences for the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes—not one. *United States v. Reed,* 639 F.2d 896, 904 (2d Cir.1981); *United States v. Hearod,* 499 F.2d 1003, 1005 (5th Cir.1974).[14]

13. Langford's first two issues—whether the evidence was sufficient to convict and whether the district court erred in giving the jury a "conscious avoidance" instruction (addressed to Langford's purported lack of knowledge about 600's land transactions)—are meritless. The evidence was more than adequate to prove the charges beyond a reasonable doubt, *see United States v. Cole,* 755 F.2d 748, 755 (11th Cir.1985), and the challenged instruction was obviously appropriate, if not required.

Langford's third issue—whether the court improperly curtailed, in violation of the sixth amendment and Fed.R.Evid. 608(b), his cross-examination of Powers—is also meritless. Langford wanted the jury to believe that Powers, on an occasion unrelated to the transactions at issue here, had defrauded a bank by misrepresenting the value of a piece of collateral, a lease he had obtained from a tenant in a building he owned. According to Langford's attorney, the misrepresentation was admissible in evidence, under Rule 608(b), as a "bad act" probative of untruthfulness.

When counsel asked Powers about the lease, the Government objected, contending that the question called for irrelevant evidence. The court properly sustained the objection. When counsel persisted, the court invited him to pursue the matter in the absence of the jury; in the court's view, with which we agree, if counsel's line of inquiry were unsuccessful and had to be stricken, the jurors might be unable to erase the matter from their minds. Counsel declined the court's invitation and thus his right to complain to us.

Langford's fourth issue involves the prosecutor's summation before the jury; he contends that the prosecutor improperly implied that Powers had pled guilty to all counts in Langford's indictment. Prosecutorial misconduct exists were the prosecutor makes improper remarks that prejudicially affect the substantial rights of the defendant. *United States v. Walther,* 867 F.2d 1334, 1341 (11th Cir.), *cert. denied,* 493 U.S. 848, 110 S.Ct. 144, 107 L.Ed.2d 103 (1989). Here, the prosecutor's remarks were entirely proper. The prosecutor simply stated that Powers "pled guilty to *it*"—referring, given the extensive cross-examination of Powers' plea agreement, to the one charge to which Powers had pled guilty.

Finally, Langford questions the trial court's exclusion of the testimony of William Kendall, president of Goldome, that it was the opinion of Goldome's board of directors that co-defendant Bufe was "innocent" of the charges contained in the indictment. This challenge is patently frivolous.

14. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

To determine whether an indictment is multiplicitous, we first determine the allowable unit of prosecution. *See United States v. Amick,* 439 F.2d 351, 359-60 (7th Cir.1971). Thus, in the instant case, we must examine the allowable unit of prosecution under the securities provisions of 15 U.S.C. §§ 78j(b), 78ff, and Rule 10b-5, 17 C.F.R. § 240.10b-5.[15]

According to Langford, a single conspiracy to defraud under 15 U.S.C. §§ 78j(b), 78ff, and Rule 10b-5 will sustain only one conviction no matter how many times the defendant uses "a means or instrumentality of interstate commerce, or the mails" to further his scheme.[16] Langford contrasts the language of the securities act with that of the mail fraud statute, 18 U.S.C. § 1341 (1988),[17] and concludes that although Congress intended to punish each use of the mails under the mail fraud statute, the gist of section 78j(b) is the fraudulent scheme employed in the sale of securities—Congress required the use of the mails "solely to create

15. Rule 10b-5 provides:

It shall be unlawful for any person directly or indirectly, by the use of any means or instrucmentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

16. The three counts in question charge Langford and Bufe with the use of three different instrumentalities of interstate commerce in furtherance of their scheme. Count two charges that on July 22, 1983, Langford and Bufe sent a proxy statement to Palmetto Federal's shareholders informing them of the proposed merger with Goldome. Count three alleges that on July 17, 1983, Langford and Bufe telephoned a representative of Atlantic Financial Federal regarding a loan guarantee. Count four alleges that on July 22, 1983, Langford and Bufe sent a letter to the Alabama Federal Savings and Loan in Tuscalcoosa, Alabama in which Palmetto Federal agreed to repurchase a mortgage loan from Alabama Federal. According to the indictment, all three of these communications were in furtherance of Langford and Bufe's fraudulent scheme.

17. Section 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means or false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository . . . any such matter or thing . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

a basis for federal jurisdiction."[18] Thus, the Government must charge the fraudulent scheme under section 78j(b) in a single count. The Government, on the other hand, contends that each and every use of the mails under a scheme to defraud is a separate offense.[19] We believe that Langford, as well as the Government, misreads the statute, but his claim that his indictment is multiplicitous is nonetheless meritorious.

While Langford correctly concludes that not every use of the mails, or other means of interstate commerce, in furtherance of a fraudulent scheme is indictable,[20] section 78j(b) makes it a crime to use or employ, in connection with the purchase or sale of a security, "any manipulative or deceptive device or contrivance" in contravention of the rules and regulations prescribed by the Securities and Exchange Commission (SEC). Under this authority, the SEC promulgated Rule 10b-5, which makes it unlawful for a person, in connection with such a purchase or sale, to (1) employ a device, scheme, or artifice to defraud, (2) make any false statement of material fact (or to make a material omission), or (3) engage in any act, practice, or course of business that operates as fraud or deceit upon any person. 17 C.F.R. § 240.10b-5 (1990). The allowable unit of prosecution under section 78j(b) is, therefore, the use of a manipulative device or contrivance, which, as clarified by the SEC in Rule 10b-5, does not have to be the complete scheme to defraud; rather, it can be any false statement of material fact in connection with a discrete purchase or sale of a security.

[8] This accords with our interpretation of the parallel

18. *See United States v. Austin*, 462 F.2d 724, 737-38 & n. 6 (10th Cir.1972); *United States v. Greenberg*, 30 F.R.D. 164, 169 (S.D.N.Y.1962); *United States v. Hughes*, 195 F.Supp. 795, 798 (S.D.N.Y.1961); *United States v. Cashin*, 281 F.2d 669, 673-74 (2d Cir.1960).

19. *See United States v. Mackay*, 491 F.2d 616, 619 (10th Cir.1973), *cert. denied*, 416 U.S. 972, 94 S.Ct. 1996, 40 L.Ed.2d 560 (1974).

20. The legislative history of the statute states that the scope of this section is confined "to *transactions* effected by the use of the mails, the instrumentalities of interstate commerce, and the facilities of a national securities exchange." S.Rep. No. 792, 73d Cong., 2d Sess. 18 (1934) (emphasis added). This indicates that the use of the mails is merely a jurisdictional requirement. *See also Austin*, 462 F.2d at 737-38 & n. 6 (10th Cir.1972).

language of 15 U.S.C. § 77q(a) (1988.[21] Under section 77q(a), we have held that it will avail a defendant nothing that the same scheme is incorporated in each count of the indictment. *United States v. Ashdown,* 509 F.2d 793, 800 (5th Cir.1975), *cert. denied,* 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975). *See supra* note 14. It is also clear from our cases that the use of the mails (or other instrumentality of interstate commerce) in conjunction with separate purchase or sale transactions clearly is sufficient to ground multiple counts. *See Ashdown,* 509 F.2d at 800; *Sanders v. United States,* 415 F.2d 621, 626 (5th Cir.1969).[22] We have not yet considered, however, whether several mailings (or other instrumentalities of interstate commerce), all based on a single transaction, likewise may be charged in multiple counts.[23] We hold that they cannot. To avoid the vices of multiplicity in

21. Section 77q(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Although this circuit has not yet determined whether the units of prosecution under 15 U.S.C. § 78j(b), Rule 10b-5, and 15 U.S.C. § 77q(a) are the same, we see no reason to interpret the sections differently in this respect—the relevant language of the sections is extremely similar—hence, congressional intent likely was the same under both statutes.

22. *See also United States v. Waldman,* 579 F.2d 649, 654 (1st Cir.1978) (stating that the court "agree[s] with every other circuit that has faced the question that the appropriate units of prosecution under § 77q(a) are *separate transactions* accompanied by use of the mails.") (emphasis added).

23. In *Ashdown,* the former Fifth Circuit stated that "it is well settled. . . that each separate use of the mails constitutes a separate offense." *Ashdown,* 509 F.2d at 800. To support this proposition the court cited *Sanders,* which made a similar statement in reference to mail fraud, not securities fraud. We assume that the court referred only to the mail fraud counts when it made this comment. In any case, since in *Ashdown* each count alleged a separate transaction, this conclusion was not necessary to the court's decision, and therefore we consider the question an open one.

In *United States v. Mackay,* 491 F.2d 616, 619 (10th Cir.1974), however, the Tenth Circuit held that the offenses of securities fraud and mail fraud were similar in that both call for proof of a scheme or design to defraud and of the use of some instrumentality of interstate commerce in furtherance of that scheme. "The jurisdictional basis is. . . the use of the mails or an instrumentality of commerce and as such each mailing is regarded as a separate crime even though it relates to essentially the same fraudulent scheme." *Id.* In support of its position, the court cited two mail fraud cases. *Id.,* at n. 1.

securities fraud cases, each count of the indictment must be based on a separate purchase or sale of securities and each count must specify a false statement of material fact—not a full-blown scheme to defraud—in connection with that purchase or sale.

In the instant case, Langford was charged with three counts of securities fraud, all based on the same scheme to defraud and on the same purchase of securities—the sale of Palmetto Federal's stock to Goldome. In Langford's indictment, the Government tracked the statutory language and charged generally in each count that Langford and Bufe "employ[ed] a scheme and artifice to defraud, ma[de] untrue statements of material facts and omit[ted] to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engage[d] in acts, practices and a course of business which would and did operate as a fraud and deceit upon any person in connection with the purchase or sale of securities." The indictment did not allege, however, that each mailing (or other instrumentality of interstate commerce) contained a specific material misstatement; it did not allege that use of the mails was in conjunction with separate purchase or sale transactions. We find, therefore, that Langford's indictment was multiplicitous.

[9] Langford contends that the multiplicitous counts of the indictment improperly prejudiced the jury by suggesting that the defendant committed not one but several crimes and, therefore, all three counts should be reversed. The principal danger in a multiplicitous indictment is, however, that the defendant may receive multiple sentences for a single offense. *Hearod,* 499 F.2d at 1005; *Reed,* 639 F.2d at 904 n. 6. This danger need not concern us in this case as the sentenances for the multiplicitous counts run concurrently.[24]

The jury properly found the evidence presented at trial to be sufficient to convict Langford on each count of the indictment. If we were to set aside Langford's three convictions for securities fraud and remand the case for retrial on one count, to be selected

24. *See Reed,* 639 F.2d at 904 n. 6 (stating that "[t]he principal danger in multiplicity—that the defendant will be given multiple sentences for the same offense—can be remedied at any time by merging the convictions and permitting only a single sentence."). *See also United States v. Welch,* 656 F.2d 1039, 1054 n. 21 (5th Cir. Unit A Sept.1981) (stating that no reversal is required where sentences run concurrently on multiplicitous counts). *See supra* note 14. *Cf. United States v. Lemons,* 941 F.2d 309 (5th Cir.1991) (reversing and vacating the convictions on multiplicitous counts where the sentences run consecutively).

by the Government, as Langford asks, this body of evidence would still be available to the Government and, in our view, would lead inexorably to conviction again on the elected count. For this reason *and* because Langford's sentences on these convictions are concurrent,[25] we find the multiplicity of counts in this case to be harmless error; we therefore treat Langford's convictions, and sentences, on counts two, three, and four of the indictment as merged into one count.

III.

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

25. In fact, all of Langford's sentences in this case—each calling for three years imprisonment—are concurrent.